Editor's note: appealed - stipulated dismissal, Civ.No.81-1355 (D.Idaho Apr. 25, 1986)

GUY A. MATTHEWS

IBLA 81-991 Decided October 6, 1981

Appeal from decision of Idaho State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. I MC 31772 through I MC 31781.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Recordation

   Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on or before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.

2. Agency--Applications and Entries: Filing--Federal Land Policyand Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Recordation-- Mistakes

   One who chooses the means of delivery of a document must accept the responsibility and bear the consequences of delay or nondelivery by that method.

3. Federal Land Policy and Management Act of 1976: Recordation ofMining Claims and Abandonment--Mining Claims: Abandonment

   The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse non-compliance with the statute, or to afford claimants any relief from the statutory consequences.

4. Administrative Authority: Generally--Constitutional Law: Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Recordation

   Department of the Interior, as an agency of the executive branch of the Government, is without jurisdiction to consider whether the mining claims recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

5. Administrative Procedure: Hearings--Constitutional Law: Due Process--Rules of Practice: Hearings

   Due process does not require notice and a right to be heard prior to the initial decision in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

APPEARANCES: Claude Marcus, Esq., Barry Marcus, Esq., Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Guy A. Matthews appeals the August 11, 1981, decision of the Idaho State Office, Bureau of Land Management (BLM), which declared the unpatented Liberty Gem #1, #2, #3, #7, #8, #9, and #10, and Badger #1, #2, and #3 lode mining claims, I MC 31772 through I MC 31781, abandoned and void because no evidence of assessment work or notice of intention to hold the claims was received by BLM on or before December 30, 1980, as required by sec. 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and 43 CFR 3833.2.

Appellant states that the assessment work for the assessment year ending September 1, 1980, was done upon and for the benefit of the 10 named mining claims, and was duly recorded with the County Recorder of Blaine County, Idaho. A copy of the recorded proof of labor accompanied the notice of appeal. Appellant avers that a copy of the recorded proof of labor had been transmitted to BLM following receipt of the recorded instrument from the Blaine County Recorder in September 1980. Appellant requests a hearing to present evidence with respect to the issue of whether the evidence of assessment work was submitted to BLM by December 30, 1980. Appellant also argues that BLM improperly interprets FLPMA in its decision, and that if BLM is correct, it effects an unconstitutional taking of private property without due process.

The subject claims, located in 1965 and 1967, were recorded with BLM October 17, 1979, in compliance with FLPMA. Evidence of assessment work for 1979 was also filed with BLM at that time.

[1] Under section 314(a) of FLPMA, supra, the owner of a mining claim located on or before October 21, 1976, must file a notice of intention to hold the claim or evidence of performance of annual assessment work on the claim in the proper BLM office on or before October 22, 1979, and prior to December 31 of each calendar year thereafter. This requirement is mandatory, not discretionary, and failure to comply is conclusively deemed to constitute abandonment of the claim by the owner and renders the claim void. Fahey Group Mines, Inc., 58 IBLA 88 (1981); Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981); James V. Brady, 51 IBLA 361 (1980); 43 U.S.C. § 1744(c) (1976).

[2] Although it seems clear that the requisite assessment work was performed on these claims for the 1980 assessment year and that proof of labor was duly recorded in Blaine County, Idaho, the evidence in the case record does not establish that the proof of labor was filed with BLM on or before December 30, 1980. The pertinent regulation, 43 CFR 3833.1-2(a), provides that "file" means "being received and date stamped by the proper BLM office." Filing is accomplished only when a document is delivered to and received by the proper BLM office. Depositing a document in the mails does not constitute filing. 43 CFR 1821.2-2(f). If Postal Service error prevents an envelope from reaching the proper BLM office, that fact does not excuse appellant's failure to comply with the statutory requirements and the regulations. Whelan's Mining & Exploration, Inc., 58 IBLA 127 (1981); Glenn D. Graham, 55 IBLA 39

(1981); Everett Yount, 46 IBLA 74 (1980); James E. Yates, 42 IBLA 391 (1979). This Board has held repeatedly that a mining claimant, having chosen the Postal Service as his means of delivery, must accept the responsibility and bear the consequences of loss or untimely delivery of his filing. Whelan's Mining & Exploration, Inc., supra; Everett Yount, supra; James E. Yates, supra; Amanda Mining & Manufacturing Association, 42 IBLA 144 (1979). The responsibility for complying with the recordation requirements of FLPMA rested with appellant. This Board has no authority to excuse lack of compliance or to afford relief from the statutory consequences. Lynn Keith, supra.

[3] The Board responded to arguments similar to those presented here in Lynn Keith, supra, and held:

> The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself, and would operate even without the regulations. See Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management, Civ. No. 78-46 (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. Thomas F. Byron, 52 IBLA 49 (1981).

53 IBLA at 196, 88 I.D. at 371-72.

[4] As for the constitutionality of section 314 of FLPMA, appellant's challenge to the statute cannot be sustained here. The Board adheres to its earlier holdings that the Department of the Interior, being an agency of the executive branch of the Government, is not the proper forum to decide whether an Act of Congress is constitutional. Lynn Keith, supra; Alex Pinkham, 52 IBLA 149 (1981), and cases cited therein. Jurisdiction of such an issue is reserved exclusively to the judicial branch. However, to the extent that the recordation section of FLPMA has been considered by the courts, it has been upheld. See Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981); Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981).

[5] Due process does not require notice and a right to be heard prior to the initial decision in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final. Appeal to this Board satisfies due process requirements. Fahey Group Mines, Inc., supra; George H. Fennimore, 50 IBLA 280 (1980); Dorothy Smith, 44 IBLA 25 (1979); H. B. Webb, 34 IBLA 362 (1978). Appellant's request for a hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Gail M. Frazier
Administrative Judge